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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 WILLIAM KRIGBAUM,

8 Plaintiff,

9 v.

10 MACHOL & JOHANNES, LLC,

11 Defendant.

NO. 2:18-CV-0064-TOR

ORDER GRANTING DEFENDANT
MACHOL & JOHANNES, LLC'S
MOTION FOR SUMMARY
JUDGMENT

12 BEFORE THE COURT is Defendant Machol & Johannes, LLC's, Motion

13 for Summary Judgment (ECF No. 14). The Court has reviewed the record and

14 files herein, the completed briefing and is fully informed. For the reasons

15 discussed below, Defendant's Motion for Summary Judgment (ECF No. 14) is

16 **GRANTED.**

17 **BACKGROUND**

18 Plaintiff William Krigbaum alleges that Defendant Machol & Johannes,

19 LLC, violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §

20 1692e, by "[u]sing false representations or deceptive practices in connection with

1 collection of a debt, including filing a lawsuit against Plaintiff many weeks after
2 Plaintiff had been served with a Complaint before filing and without serving
3 Plaintiff by personal service thereafter (§ 1692e(10)).” ECF 13 at 2, ¶ 9.
4 Defendant moves for summary judgment, seeking a complete dismissal of
5 Plaintiff’s claims with prejudice. ECF No. 14.

6 **FACTS**

7 The following are the undisputed facts unless otherwise noted. Plaintiff’s
8 claims arise out of a debt that Defendant attempted to collect from Plaintiff on
9 behalf of Defendant’s client, LVNV Funding, LLC. On May 14, 2017, Defendant
10 served Plaintiff with process seeking to collect the amounts owed to LVNV
11 Funding, LLC. ECF No. 15 at 1, ¶ 1. Plaintiff was served with both a copy of the
12 summons and a copy of the complaint. ECF No. 16 at 1-2, ¶ 2. Plaintiff called
13 Defendant on May 15, 2017, and served his answer on June 5, 2017. ECF No. 15
14 at ¶ 2.

15 On June 16, 2017, Defendant filed the Complaint in Walla Walla County
16 Superior Court. ECF No. 16 at 2, ¶ 4. Months later, Plaintiff’s counsel contacted
17 Defendant alleging that Defendant had violated the FDCPA by serving the lawsuit
18 before it was filed. *Id.* at ¶ 5. Defendant has not taken any action in the Walla
19 Walla County case since it was filed. *Id.* at ¶ 6.

1 Plaintiff initiated this lawsuit on February 22, 2018, seeking damages for
2 violations of the FDCPA. ECF No. 1.

3 **DISCUSSION**

4 Summary judgment is appropriate when “there is no genuine dispute as to
5 any material fact and the movant is entitled to judgment as a matter of law.” Fed.
6 R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court views the
7 facts, as well as all rational inferences therefrom, in the light most favorable to the
8 non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

9 The party moving for summary judgment bears the initial burden of showing
10 the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477
11 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify
12 specific facts showing there is a genuine issue of material fact. *Anderson v.*
13 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). There must be evidence on which a
14 jury could reasonably find for the plaintiff and a “mere existence of a scintilla of
15 evidence in support of the plaintiff’s position will be insufficient[.]” *Id.* at 252.
16 For purposes of summary judgment, a fact is “material” if it might affect the
17 outcome of the suit under the governing law. *Id.* at 248. A material fact is
18 “genuine” where the evidence is such that a reasonable jury could find in favor of
19 the non-moving party. *Id.*

1 In the pending motion, Defendant moves this Court to dismiss Plaintiff's
2 case on summary judgment because “[s]erving and filing process in compliance
3 with Washington law is not a ‘false representation or deceptive means’ of
4 collecting a debt.” ECF No. 14 at 2. Pursuant to the FDCPA, a debt collector is
5 prohibited from using “any false representation or deceptive means to collect or
6 attempt to collect any debt . . .” 15 U.S.C. § 1692e(10). The standard for
7 determining whether a communication is deceptive or misleading under
8 § 1692e(10) is whether the “least sophisticated consumer” could have been
9 deceived or misled by a communication. *Donohue v. Quick Collect, Inc.*, 592 F.3d
10 1027, 1033 (9th Cir. 2010). In making this determination, the Ninth Circuit has
11 adopted a “materiality” approach, under which “false but non-material
12 representations are not likely to mislead the least sophisticated consumer and
13 therefore are not actionable under [§ 1692e].” *Id.*

14 Based on the allegations in Plaintiff's First Amended Complaint, Defendant
15 surmises that “it is apparently plaintiff's contention that a litigant who serves
16 before filing must serve process on defendant a second time.” ECF No. 14 at 1.
17 Defendant asserts that, contrary to Plaintiff's contentions, “Washington law
18 provides for service of process before filing, and requires that process be served
19 only once.” *Id.* at 2. Because its actions conformed to Washington law, Defendant
20 argues that summary judgment is appropriate as it “did nothing that could be

1 considered either a ‘false representation’ or a ‘deceptive means’ of collection
2 within the meaning of the FDCPA.” *Id.* at 2-3.

3 Plaintiff maintains that he “has alleged deceptive behavior by Defendant that
4 creates a genuine dispute of fact as to whether Defendant engaged in a deceptive
5 practice.” ECF No. 17 at 4. Elaborating on this alleged “deceptive behavior,”
6 Plaintiff explains that “[i]t is unfair and deceptive for Defendant to demand that
7 Plaintiff file an Answer within 20 days after service, where it is impossible for
8 Plaintiff to have done so because the lawsuit had not been filed and thus Plaintiff
9 had no extant case under which an Answer could have been filed as of the
10 expiration of that 20-day period, which was June 3, 2017.” *Id.* at 2. In short,
11 Plaintiff appears to argue that § 1692e(10) of the FDCPA requires a debt collector,
12 when seeking to collect a debt in Washington, to file a Complaint prior to the 20-
13 day Answer deadline specified in the summons. According to Plaintiff, if “no
14 Complaint is filed by the consumer’s Answer deadline,” the unsophisticated
15 consumer could reasonably conclude that “the lawsuit was not legitimate” and an
16 answer was not required, subjecting the consumer to the risk of a default judgment.
17 *Id.* at 2-3.

18 To support this position, Plaintiff alleges that other courts have recognized
19 “the potential unfairness of this situation and have implemented schemes designed
20 to combat the potential deceptiveness of behavior like Defendants’ here.” *Id.* at 3.

1 Plaintiff points to a Utah Rule of Civil Procedure that requires a summons in a
2 “serve-first” lawsuit to state that a Defendant need not answer if the complaint is
3 not filed within 10-days after service. *Id.* (citing Utah R. Civ. Pro. 4(c)(2)(A)).
4 Plaintiff acknowledges that “[n]o such rules have been implemented in
5 Washington,” but claims that “the fact that other courts have implemented such
6 rules corroborates that a genuine risk of harm exists with respect to the failure by
7 Plaintiffs to actually file serve-first lawsuits before the deadline to respond to them
8 has expired.” *Id.* Plaintiff also contends that “similar deceptive behavior by
9 attorneys in state court litigation has been held to be cognizable under 15 U.S.C.
10 §1692e by many federal courts.” *Id.* at 3-4.

11 As Defendant notes, Washington Civil Rule 3(a) provides that “a civil action
12 is commenced by service of a copy of a summons together with a copy of a
13 complaint, as provided in rule 4 or by filing a complaint.” Upon written demand
14 by any other party, the Plaintiff instituting the action is required to file the
15 summons and complaint within 14-days after service of the demand. Wash. Civ.
16 R. 3(a). Washington Civil Rule 4 describes the requirements for the issuance,
17 form, and service of a summons and a complaint. Civil Rule 4(a)(2) specifies that
18 “the summons shall require the defendant to serve a copy of the defendant’s
19 defense within 20 days after the service of summons, exclusive of the day of
20 service.” Civil Rule 4(b)(2) requires that the form of the summons include the

1 following language: “In order to defend against this lawsuit, you must respond to
2 the complaint by stating your defense in writing, and by serving a copy upon the
3 person signing this summons within 20 days after the service of this summons . . .”
4 Civ. R. 4(b)(2). Civil Rule 4(b)(2) also requires that the summons inform the
5 Defendant that he or she has the right to demand the Plaintiff file the lawsuit with
6 the court.

7 Here, Defendant served and filed process in compliance with Washington
8 law. Defendant served Plaintiff with a copy of both the summons and the
9 complaint on May 14, 2017, as permitted under Civil Rule 3(a). ECF No. 15 at 1,
10 ¶ 1. The form of the summons instructed Plaintiff to “respond to the Complaint by
11 stating your defense in writing, and serve a copy upon the undersigned attorney for
12 the Plaintiff within 20 days . . . after the service of this Summons,” as mandated by
13 Civil Rule 4(b)(2). ECF No. 16 at 5 (Ex. A). The summons also informed
14 Plaintiff that he was entitled to demand that Defendant file the lawsuit with the
15 court. *Id.* at 6. Plaintiff did not make any such demand, and instead served his
16 answer on June 5, 2017. Defendant subsequently filed the Complaint on June 16,
17 2017.

18 Viewing the evidence in the light most favorable to Plaintiff, the Court finds
19 that Plaintiff fails to produce sufficient evidence to create a genuine issue of
20 material fact as to whether Defendant’s conduct, as alleged in the Amended

1 Complaint, constitutes “false representations or deceptive practices in connection
2 with collection of a debt” in violation of the FDCPA. ECF No. 13 at 2, ¶ 9.
3 Contrary to Plaintiff’s contention, the evidence does not support the allegation that
4 Defendant’s summons or complaint contained a false, deceptive, or misleading
5 representation for purposes of liability under § 1692e(10). To the contrary, the
6 evidence conclusively establishes that Defendant’s conduct in attempting to collect
7 a debt from Plaintiff—specifically, its service of process—fully complied with
8 Washington law and accurately informed Plaintiff that he had 20-days to serve his
9 answer to the summons and the right to demand that the lawsuit be filed with the
10 court. Plaintiff’s allegations do not support a finding that the “least sophisticated
11 consumer” could have been deceived or misled to believe from Defendant’s
12 statements that Plaintiff did not need to respond to the lawsuit. The fact that
13 Plaintiff *did* respond to the lawsuit cuts against this very argument.

14 Moreover, Plaintiff’s reference to Utah’s requirements for “serve-first”
15 lawsuits does not corroborate “the potential unfairness of this situation.” ECF No.
16 17 at 3. As discussed, Washington law provides for service of process before
17 filing, and requires that process be served only once. Nor are any of the federal
18 cases cited by Plaintiff factually analogous to the situation here. In those cases, the
19 Defendant actively engaged in conduct that mislead the Plaintiff to believe that it
20 was too late or unnecessary to file an answer to the complaint. *See Grden v. Leikin*

1 *Ingberg & Winters PC*, 643 F.3d 169 (6th Cir. 2011); *Riding v. Cach LLC*, 992
2 F.Supp.2d 987 (C.D. Cal. 2014). Here, in contrast, Defendant accurately informed
3 Plaintiff that an answer was required within 20-days after service, and Plaintiff
4 served his answer in accordance with those instructions.

5 In sum, Plaintiff has not come forward with admissible evidence to
6 demonstrate a triable issue as to whether Defendant's conduct amounts to a
7 "deceptive means" to collect a debt under 15 U.S.C. § 1692e(10). Accordingly,
8 the Court concludes that summary judgment on Plaintiff's FDCPA claim is
9 warranted. The Court dismisses Plaintiff's FDCPA claims against Defendant with
10 prejudice.

11 | ACCORDINGLY, IT IS HEREBY ORDERED:

16 The District Court Executive is directed to enter this Order and furnish
17 copies to counsel.

18 || DATED October 29, 2018.



Thomas O Rice
THOMAS O. RICE
Chief United States District Judge